SUPREME COURT, U. S.
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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-167

UNITED STATES RAILWAY ASSOCIATION,
Appellant,

v.

CONNECTICUT GENERAL INSURANCE CORPORATION, *et al.*,
Appellees

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

This is an appeal from the decision of a three-judge United States District Court sitting in the Eastern District of Pennsylvania, which held unconstitutional certain sections of the Regional Rail Reorganization Act of 1973, Pub. L. 93-236, 87 Stat. 985, 45 U.S.C. §§ 701-93 ("Rail Act" or "Act"). Appellant is the United States Railway Association ("USRA" or "Association"), a "government corporation" formed pursuant to Section 201 of the Rail Act.

OPINIONS BELOW

The opinion and concurring opinion in the district court and its order of June 25, 1974, declaring certain provisions of the Rail Act null and void as violative of provisions of the Constitution and enjoining Appellant from taking certain actions pursuant to the Rail Act, are reprinted in the Joint Appendix ("JA") at JA 9-83. The opinions are not yet officially reported.

JURISDICTION

These cases were brought pursuant to 28 U.S.C. §§ 1331 (a), 1337, 2201, and 2202, seeking a declaratory judgment that the Rail Act is void for repugnance to the United States Constitution and seeking an injunction against the enforcement, operation, and execution of the Rail Act. The actions by Richard Joyce Smith (Civil No. 74-1107) and by Penn Central Company (Civil No. 74-1149) were originally brought in the United States District Court for the District of Columbia; the action by Connecticut General Insurance Corporation (Civil No. 74-189) was brought in the United States District Court for the Eastern District of Pennsylvania. Three-judge courts were convened pursuant to 28 U.S.C. §§ 2282 and 2284. The Judicial Panel on Multidistrict Litigation, in a non-reviewable order, denied a motion of Defendants to consolidate the three actions before the Special Court constituted under Section 209 of the Rail Act, or in the alternative to transfer the actions for pre-trial proceedings under 28 U.S.C. § 1407 to the judges of the Special Court sitting as a Section 2282 three-judge court in the United States District Court for the District of Columbia. By consent of the parties, the *Smith* and *Penn Central Company* actions were then transferred to the Eastern District of Pennsylvania and consolidated with the *Connecticut General* action.

The order appealed from was entered on June 25, 1974 in all three cases. No order has been issued respecting a rehearing. Notice of Appeal to this Court was filed in the United States District Court for the Eastern District of Pennsylvania on July 17, 1974. JA 386. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1252 and 1253. See *Shapiro* v. *Thompson*, 394 U.S. 618, 625 (1969); *United States* v. *Raines*, 362 U.S. 17, 20 (1960); *Fleming* v. *Rhodes*, 331 U.S. 100, 102-04 (1947).

STATUTE INVOLVED

The statute involved in this appeal is the Regional Rail Reorganization Act of 1973, Pub. L. 93-236, 87 Stat. 985, 45 U.S.C. §§ 701-93, which is reprinted at JA 391-431.

QUESTIONS PRESENTED

1. Whether the court below erred in granting injunctive relief on Plaintiffs' claims that the Rail Act may effect a taking of their property without just compensation, when Plaintiffs have adequate remedies at law including a suit in the Court of Claims under the Tucker Act, 28 U.S.C. § 1491.

2. Whether the court below breached its duty to construe statutes so as to save their constitutionality when it construed the Rail Act, despite its silence on the subject, as amending the Tucker Act by implication so as to bar any suit in the Court of Claims to recover any difference between the consideration provided in the Rail Act and the "constitutional minimum" expressly recognized in the Rail Act—a construction of the Rail Act which led the court to declare certain provisions of the Rail Act unconstitutional.

3. Whether the court breached its duty to construe statutes so as to save their constitutionality when, after holding that the Rail Act impliedly amended the Tucker Act to bar a remedy for constitutional claims of rail estates, the court

(a) construed Section 304(f) of the Rail Act to authorize USRA to forbid discontinuance of rail service or abandonment of rail properties even if the "erosion" of the railroad estate should pass the limits beyond which operations can no longer be constitutionally required without compensation—a construction of Section 304(f) which led the court to hold Section 304(f) unconstitutional; and

(b) construed Section 303 of the Rail Act, which expressly requires a "constitutional minimum" consideration for transfers of rail property, to exclude consideration for erosion beyond constitutional limits —a construction of Section 303 which led the court to hold Section 303 unconstitutional.

4. Whether the court below erred in first enjoining all Defendants from taking any action under Section 304(f) to require continuation of rail service that would result in "erosion" beyond constitutional limits and thereafter nullifying other provisions of the Rail Act solely for their failure to provide explicitly for just compensation for the very "erosion" beyond constitutional limits that the court had already enjoined Defendants from causing.

5. Whether, in any event, an injunction unconditionally prohibiting USRA from certifying any Final System Plan for a reorganized rail system to a federal court was an unnecessary and inappropriate remedy to prevent the possibility of erosion beyond constitutional limits that the court had already enjoined USRA and all other Defendants from causing.

STATEMENT OF THE CASE

Eight major railroads operating in the Northeast/Midwest region of the United States are now in reorganization proceedings pursuant to Section 77 of the Bankruptcy Act, 11 U.S.C. § 205. Because of the serious threat this rail crisis presented to the welfare of the region and of the United States, see Section 101(a) of the Rail Act, and because of the inability of the procedures and resources of Section 77 to resolve the underlying problems of railroads in this region, Congress enacted the Regional Rail Reorganization Act of 1973, which became law on January 2, 1974.

Plaintiffs below are creditors and the sole shareholder of the largest of the railroads now in reorganization, Penn Central Transportation Company ("Penn Central"). They brought these actions seeking declaratory judgments that the entire Rail Act is unconstitutional on its face on a large number of grounds, and further seeking injunctions against the implementation of any of its provisions. JA 161-75. The Penn Central Trustees intervened as Defendants. JA 191. Both sides filed Motions for Summary Judgment. JA 221-25. This appeal is taken from a final judgment granting in part Plaintiffs' Motions for Summary Judgment and denying Defendants' Motions. JA 9-83.

Summary of the Rail Act

In broad summary, the Rail Act provides for the following steps, among others, to achieve "the reorganization of railroads in this region into an economically viable system capable of providing adequate and efficient rail service to the region," Section 101(b)(2).

(a) A new government corporation, Appellant USRA, has been formed pursuant to Section 201 of the Rail Act.

Its directors are a Chairman appointed by the President and confirmed by the Senate; the Secretary of Transportation; the Secretary of the Treasury; the Chairman of the Interstate Commerce Commission ("ICC"); and seven other individuals appointed by the President and confirmed by the Senate. Section 201(d).

(b) Each United States district court having jurisdiction of a railroad in the region in reorganization under Section 77 ("Reorganization Court") was required, pursuant to Section 207(b) of the Rail Act, to determine within 180 days of enactment whether its railroad should be reorganized pursuant to the Rail Act. Such determinations (which are described below under the heading "Reorganization Court Proceedings") have been made and are now under review by a Special Court as described below.

(c) USRA is directed, with the assistance of the Secretary of Transportation and the Rail Services Planning Office, a new office within the ICC created by the Rail Act, to prepare a "Final System Plan" for restructuring and reorganizing the railroads in reorganization. Sections 202, 204, 205, and 206. The goals of the Final System Plan are set forth in Section 206(a), and include the creation of a "financially self-sustaining rail service system" in the region. A central feature of the Final System Plan will be the transfer of designated rail properties of railroads in reorganization to a new, for-profit corporation created pursuant to Section 301 of the Rail Act and called Consolidated Rail Corporation ("Conrail"). In exchange for these properties, the Final System Plan will provide for the issuance to the estates of railroads in reorganization of the securities of Conrail, plus up to $500 million of USRA obligations guaranteed by the United States. Sections 206(d)(1), 210.

(d) USRA is required to submit a proposed Final System Plan to Congress within 450 days of enactment (*i.e.*, by March 28, 1975). Sections 207(c), 208(a). The Plan is deemed "approved" and becomes "effective" if neither house of Congress disapproves it within sixty continuous session days after submission. Sections 208, 209(a).

(e) The Final System Plan is then transmitted by USRA, within 90 days after its effective date, to a special United States district court of three judges, created pursuant to Section 209 of the Rail Act and therein given exclusive jurisdiction of all "proceedings with respect to the final system plan." Section 209. This "Special Court" has been formed in the District of Columbia and has the task, in addition to conducting proceedings with respect to the Final System Plan, of reviewing the determinations of the Reorganization Courts described in paragraph (b) above.

(f) Section 303(a) of the Rail Act provides that the Conrail securities and USRA obligations designated in the Final System Plan for transfer to the estates of railroads in reorganization shall be delivered to the Special Court within ten days after the Plan is delivered to that Court. The Special Court is then directed, within a further ten days, to order the trustees of each railroad in reorganization to transfer to Conrail all right, title and interest in the rail properties designated in the Final System Plan. Section 303(b). Thereafter, the Special Court determines whether the exchange of rail properties for Conrail securities, USRA obligations and such other benefits as the Rail Act provides, is fair and equitable to the estate of each railroad in reorganization. Section 303(c). If the Special Court finds that the transfer is not fair and equitable "in accordance with the standard of fairness and equity applicable to the approval of a plan of reorganization or a step in such a plan under Section 77

of the Bankruptcy Act," it is directed to order a reallocation of the Conrail securities, and/or to order the issuance of additional Conrail securities and USRA obligations (subject to an overall $500 million limitation on USRA obligations used for this purpose), and/or to enter a judgment against Conrail. *Id.* Section 303 does not authorize the Special Court to enter a judgment against the United States. Section 303 does, however, recognize that the consideration to be transferred in exchange for rail properties must equal the "constitutional minimum" and directs the Special Court to make necessary adjustments so that this "constitutional minimum" is not exceeded. Section 303(c)(3). The judgment of the Special Court may be appealed directly to this Court "in the same manner that an injunction order may be appealed under Section 1253 of Title 28." Section 303(d).

(g) Section 304 of the Rail Act authorizes the discontinuance of service on, and the abandonment of, rail properties not designated for continuing use in the Final System Plan. Section 304(f) prohibits discontinuance of any rail service by any railroad in reorganization in the region before the implementation of the Final System Plan without the consent of USRA.

(h) The Rail Act provides expedited procedures for the sale to profitable railroads operating in the region of rail properties not going to Conrail and the sale or lease of such rail properties to states and localities and to the National Railroad Passenger Corporation ("Amtrak"). Section 206(c).

(i) The Rail Act also provides new financial assistance of several kinds. Conrail can receive up to $1 billion in USRA obligations guaranteed by the United States, of which $500 million must be used for the "rehabilitation and modernization of rail properties" acquired by Conrail and the remainder may be used for that purpose or

for other purposes including the acquisition of rail properties. Section 210. An additional $500 million of guaranteed USRA obligations is provided to enable Amtrak to purchase or lease from railroads in reorganization rail properties designated in the Final System Plan to be used for passenger service. Sections 206(c)(1)(C), 210(b), 601(d). The Rail Act also provides $250 million in benefits to railroad employees (and thus, indirectly, to the railroads now obligated to employ them) whose employment is terminated or affected by the restructuring of rail services provided by the Final System Plan. Section 509. The Rail Act also provides assistance for the immediate acquisition, maintenance and improvement of property that will be in the Final System Plan, Section 215; funds for emergency needs of railroads in reorganization pending implementation of the Final System Plan, Section 213; and subsidies for continuing non-economic local rail service after the Final System Plan is implemented. Section 402.

Reorganization Court Proceedings

Section 207(b) of the Rail Act required each Reorganization Court to decide, in two stages, whether its railroad should be reorganized in accordance with the Rail Act. The first stage has been referred to as the "120-day" proceeding: each Reorganization Court was to decide, within 120 days of enactment, whether (a) its railroad is reorganizable on an income basis within a reasonable time under Section 77 of the Bankruptcy Act and if so whether (b) the public interest would be better served by continuing the reorganization under Section 77 than by proceedings under the Rail Act. If a Reorganization Court made both affirmative findings, it was authorized to keep its railroad out of subsequent Rail Act proceedings. Railroads not eliminated at the "120-day" stage went through the second stage, or "180-day" pro-

ceeding, in which each Reorganization Court was to order that reorganization proceed under the Rail Act unless it found that the Rail Act "does not provide a process which would be fair and equitable to the estate of the railroad in reorganization."

Section 207(b) also provides that appeals from Reorganization Court orders pursuant to that section shall be made to the Special Court. It further provides that there shall be no appeal from the decisions of the Special Court with respect to "120-day" and "180-day" proceedings.

On the date of enactment, eight major railroads were in reorganization in the region.[1] In addition, fifteen railroad subsidiaries of Penn Central (each of which is a corporation wholly or majority-owned by Penn Central under a long-term lease) were in reorganization in conjunction with Penn Central. These subsidiaries, generally referred to as "Secondary Debtors," were considered separately from Penn Central, in their own proceedings in the Penn Central Reorganization Court. Hence, the major railroads and the Secondary Debtors required nine determinations by Reorganization Courts under Section 207(b).

Each Reorganization Court held an evidentiary hearing and received briefs and oral argument at the "120-day" stage. The result was that on May 1, 1974 two railroads —the Boston and Maine and the Erie Lackawanna— were kept out of the Rail Act procedures on the ground that they are reorganizable on an income basis under

[1] They were and are the only operating railroads in reorganization in the United States, except for a tiny carrier, the Cadillac and Lake City Railroad. The Cadillac and Lake City, which is also in the region, has been excluded from further proceedings under the Act on the ground that it is separately reorganizable on an income basis under Section 77 and the public interest would be better served by continuing under Section 77.

Section 77 and the public interest would be better served by continuing under Section 77. These rulings have not been appealed, and the decisions to eliminate these two railroads from the coverage of the Rail Act are now final.

In the remaining seven cases, the railroads were not taken out of the Rail Act at the "120-day" stage. In all cases except that of the Secondary Debtors, the Reorganization Courts found that the railroads in question were not reorganizable on an income basis under Section 77. In the case of the Secondary Debtors, the Reorganization Court found that certain of these railroads are reorganizable on an income basis under Section 77, but the Court was unable to conclude that the public interest would be better served by reorganization under Section 77 than by proceedings under the Rail Act, so it did not take them out of the Rail Act procedures at that stage.

These seven cases were therefore the subject of subsequent "180-day" proceedings in the respective Reorganization Courts. In each case hearings were held and briefs and arguments were received with respect to the question whether the Rail Act provides a fair and equitable process. These determinations were made on approximately July 1, 1974, six days after the decision of the three-judge Court below in the present case. Two Reorganization Courts, having jurisdiction over Reading Company and The Ann Arbor Railroad Company, ordered that their reorganization be proceeded with pursuant to the Rail Act. In the remaining five proceedings, which dealt with Penn Central, Secondary Debtors, Lehigh Valley Railroad Company, The Central Railroad Company of New Jersey and The Lehigh and Hudson River Railway Company, the Reorganization Courts [1] concluded,

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[1] Three of these five determinations were made by the same court. The Penn Central, Secondary Debtors, and Lehigh Valley

wholly or in substantial part on the basis of the decision below in the present case, that the Rail Act does not provide a fair and equitable process and declined to order reorganization under the Rail Act.

These seven "180-day" determinations are all on appeal to the Special Court, which is required by Section 207 (b) of the Rail Act to render its decision within 80 days after the appeals were taken, a period which expires on September 30, 1974. Appellant and other parties intend to suggest to the Special Court that it render its decision at that time but stay its mandate pending the determination by this Court of the issues on this appeal.

Proceedings Below

Plaintiffs in the present case challenged the constitutionality of the Rail Act on a number of grounds. A primary contention was that the consideration provided in the Final System Plan for required transfers of rail property pursuant to that Plan will or may, despite the statutory requirement of consideration equal to the "constitutional minimum standard of fairness and equity," fall below constitutional requirements so that the transfers will constitute a taking of Plaintiffs' property for less than just compensation in violation of the Fifth Amendment. This contention was rejected by the court below as premature.

Plaintiffs also contended below that a taking of their property without just compensation will result from the allegedly required continuation of rail operations pending implementation of the Final System Plan and the alleged "erosion" beyond constitutional limits of the Penn Central estate during this period. Appellant con-

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reorganizations are all before Judge Fullam in the Eastern District of Pennsylvania. Judge Fullam was also a member of the court below.

tended below (i) that, on any theory of "erosion," the record before the court below did not permit a determination of the amount of erosion suffered by any railroad estate or a determination that any railroad estate has reached or will soon predictably reach the "constitutional limit" beyond which operations cannot be required to continue without an adequate remedy at law for compensation; (ii) that railroad creditors and owners can constitutionally be required to sustain a reasonable burden of interim erosion while efforts are being made to restructure the railroad on a profitable basis; and (iii) that in any event Plaintiffs were not entitled to an injunction or a declaratory judgment of unconstitutionality because, if it should ultimately be determined that the Rail Act had caused an erosion of their interests beyond constitutional limits, Plaintiffs would have an adequate remedy at law in the Court of Claims under the Tucker Act for any claimed shortfall in their compensation.

The court below determined that the present existence of operating losses in the Penn Central system made the erosion issue "ripe for adjudication." The court did not define erosion, nor did it decide whether the Penn Central or any other railroad has yet reached the constitutional limit of erosion, nor did it attempt to define the constitutional limit. The court merely said,

> "we are persuaded that a significant possibility exists that a point of erosion either has been or may soon be reached so that it can be said that plaintiffs' contention of interim unconstitutional taking by continued loss operations is ripe for adjudication." JA 9 at 40.

Resolving the factual issues only to the extent of determining that the erosion question was "ripe," the court below then turned to statutory issues. The court apparently read Section 304(f), which requires a railroad in reorganization to obtain the approval of USRA be-

fore it discontinues or abandons rail service during the planning process, as authorizing USRA to withhold approval even if "erosion" has gone beyond constitutional limits and an adequate remedy at law for compensation is barred by the Rail Act. The court then concluded that the Rail Act did bar an adequate remedy at law. It explicitly rejected the contention of Appellant, of the other Government Parties, and of the Penn Central Trustees that if the constitutional limit of permissible uncompensated erosion should be passed, Plaintiffs would have an adequate remedy at law in the Court of Claims under the Tucker Act for just compensation. The court also apparently decided that the power of the Special Court, pursuant to Section 303, to determine whether transfers of rail properties are fair and equitable to the estate of each railroad in reorganization and to award the "constitutional minimum," does not include the power to remedy erosion of a railroad estate beyond constitutional limits occurring before its rail properties are transferred.

The court below treated the Tucker Act question as one of construing the Rail Act to determine whether Congress intended, when it passed the Rail Act, to provide a remedy under the Tucker Act for claims that property of bankrupt railroads had been taken for public use under the Rail Act for less than constitutionally adequate compensation. Although the Rail Act contains thirteen separate provisions explicitly limiting the application of other statutes but does not mention the Tucker Act, the court below nevertheless concluded that the Tucker Act remedy would not be available because, "[w]e are persuaded that the legislative history supports the conclusion that Congress intended that financial obligations [of the United States] be limited to the express terms of the Act." JA 9 at 50. The court said that to "read a Tucker Act remedy into the [Rail] Act"

would be "judicial legislation on a grand, if not arrogant, scale." JA 9 at 53.

The court below thus struck down part of the statute as unconstitutional by attributing to Congress an intent —nowhere stated in the words of the Rail Act or even in the reports of the responsible Senate and House Committees—to bar rail creditors from invoking the century-old statutory remedy for claims that private property has been taken for public use for less than just compensation. Specifically, the court below partially nullified Section 304(f) and Section 303 of the Rail Act. Section 304 (f) provides that pending determination of the rail service properties to be included in the Final System Plan,

> "no railroad in reorganization may discontinue service or abandon any line of railroad other than in accordance with the provisions of this Act, unless it is authorized to do so by the Association and unless no affected State or local or regional transportation authority reasonably opposes such action . . . ."

The court below held this section,

> "null and void as violative of the Fifth Amendment of the United States Constitution, to the extent that it would require continued operation of rail services at a loss in violation of the constitutional rights of the owners and creditors of a railroad." JA 9 at 82-83.

The court did not define such constitutional rights, but it enjoined all Defendants,

> "from taking any action to enforce the provisions of Section 304(f) . . . with respect to any abandonment, cessation or reduction of service which has been or may hereafter be determined by a court of competent jurisdiction to be necessary for the preservation of rights guaranteed by the United States Constitution." JA 9 at 82.

Technically, this order has effect only if some other court (presumably a Reorganization Court) determines that an abandonment, cessation, or reduction of service is constitutionally required. However, the court below went on to declare that Section 303 of the Rail Act, relating to transfer of rail properties pursuant to the Final System Plan, is

> "null and void as contravening the Fifth Amendment of the United States Constitution insofar as it fails to provide compensation for interim erosion pending final implementation of the Final System Plan . . . ." JA 9 at 82.

In addition, without explanation, the court enjoined USRA, unconditionally, from certifying *any* final system plan to the Special Court pursuant to Section 209(c).

Plaintiffs made a third challenge to the Rail Act on the ground that it is not "uniform" within the meaning of Article I, Section 8, Clause 4, of the Constitution, providing that Congress shall have the power to enact "uniform Laws on the subject of Bankruptcies throughout the United States." The court below rejected this contention except as to one sentence of Section 207(b). That sentence provides that if any Reorganization Court determines, in the "180-day" proceedings, that the Act does not provide a fair and equitable process to assist the reorganization of its debtor and therefore that the debtor shall not be reorganized in accordance with the Act, then the Reorganization Court shall dismiss the Section 77 proceedings. Since the court's ruling nullifying this dismissal requirement does not materially affect the administration of the Rail Act, we do not appeal from this part of the court's order.

THE QUESTIONS ARE SUBSTANTIAL

It is unnecessary to discuss at length either the public importance or the urgency of the constitutional and statu-

tory questions presented by these cases. The Northeast/Midwest rail crisis is a major national problem. The Rail Act represents a comprehensive and "heroic" [1] congressional response. The need for prompt action to resolve the crisis was recognized by Congress in the tight schedules provided in the Rail Act itself and is accepted, we believe, by every party before this Court. If the Rail Act is ultimately held constitutional, it is in the interest of both the creditors and shareholders of the railroads and the public dependent on rail transportation to implement its provisions as rapidly as possible. If the Act violates the Constitution, then another solution to the rail crisis must be sought immediately.

USRA now has a staff of over 130 persons engaged in work that will lead to the preparation of a Final System Plan. Other federal agencies, states, local governments, and railroads in reorganization must make major contributions to this work. The court below has now enjoined USRA from certifying any Final System Plan to the Special Court. Whether that injunction is proper is now an urgent question.

Specifically, this case presents, first, the question whether actions specifically authorized by congressional statute may be enjoined on the ground that they may lead to a taking of private property without just compensation. We are aware of no other instance of such an injunction. In *Hurley* v. *Kincaid*, 285 U.S. 95 (1932), this Court held that the jurisdiction of the Court of Claims to award just compensation after a claimed taking is as broad as the constitutional right and provides an adequate remedy at law barring injunctive relief in advance of the taking. Consequently, the Court held, it was unnecessary and inappropriate for a federal district

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[1] *In re Litigation under the Regional Rail Reorganization Act of 1973*, Docket No. 166, at 3 (Judicial Panel on Multidistrict Litigation, Mar. 1, 1974).

court sitting in equity even to inquire whether a taking would in fact occur. See also *Yearsley* v. *W.A. Ross Construction Co.*, 309 U.S. 18 (1940).

Hurley was a case in which Congress had provided, in a flood control statute, that land in the path of a planned diversion channel should be condemned before construction of floodworks. The statute expressly barred federal liability for flooding itself. When plaintiff alleged that his land in the path of the diversion channel had not been condemned, plaintiff therefore sought an injunction to bar construction. This Court unanimously denied injunctive relief on the ground that construction of the diversion channel had been authorized by Congress and that therefore, if it should result in a taking of plaintiff's land, he would have an adequate remedy in the Court of Claims. In *Hurley*, there were much stronger grounds, in the statute itself, to infer that Congress might have intended to bar such a remedy, but the Court refused to draw such an inference because of its constitutional implications. In these cases, by contrast, the court below inferred a congressional intent to act unconstitutionally and used this inferred intent to strike down several critical statutory provisions.

The court below found a congressional intent to bar a Tucker Act remedy not in the words of the statute, which is silent, nor in the reports of congressional committees, none of which discusses the point. The decision below rests on a few exchanges among individual members on the floor of the Senate and House. Those exchanges, however, show only a congressional intent to restructure rail services in a manner that Congress believed would not result in any transfer of property for less than the "constitutional minimum" consideration that the Act expressly recognizes as due. There is no basis in these exchanges for concluding that Congress intended to bar the normal Tucker Act remedy if, contrary to Congress' expectation, the steps taken pursuant to the

Rail Act should give rise to a claim that the consideration received is less than the "constitutional minimum." Indeed, Congress may never have considered this precise question. Nevertheless, the court below read these fragments of legislative history as showing an affirmative intent to deny the constitutionally required remedy for any transfer on terms that the Special Court (and this Court on appeal) might find to provide less than the "constitutional minimum." In so doing, the court below necessarily found that Congress deliberately intended to act unconstitutionally. Even if the Rail Act were ambiguous on this point, the court ignored its duty to construe statutes in a manner that would save their constitutionality, and thus engaged in the very type of judicial legislation from which it professed to abstain.

The court below also placed an unnecessarily narrow construction on Section 303 of the Rail Act and then struck it down on grounds that appear gratuitous even on the court's construction. Section 303 provides that the Special Court shall determine whether transfers of rail properties "are fair and equitable to the estate of each railroad in reorganization" and requires the Special Court to adjust the consideration given to rail estates in specified ways to meet the "constitutional minimum standard of fairness and equity." Although the court below rejected as premature the principal constitutional challenges to the Section 303 transfer provisions, it apparently read Section 303 as not authorizing the Special Court to take erosion beyond constitutional limits into account in determining how much consideration each railroad estate is constitutionally required to receive. Nothing in Section 303, however, precludes the Special Court from providing consideration for erosion where constitutionally required.

Moreover, even if the court's narrow construction of Section 303 were justified, the result it reached was not. Since the court had already more than adequately dealt

with the erosion problem by enjoining Defendants from requiring erosion beyond constitutional limits, there was no need to strike down Section 303 because of an inferred failure to provide compensation for the very erosion the court itself had barred.

If the Rail Act impliedly bars any remedy for "erosion" beyond constitutional limits, then this appeal presents the further question whether it was appropriate for the court below (a) to decide that the constitutionality of Section 304(f) was ripe for adjudication even though the constitutional limit of erosion had not been found to be reached and might not ever be reached; (b) to interpret Section 304(f) as permitting USRA to refuse to approve discontinuances and abandonments even when such a decision would result in erosion beyond constitutional limits for which (on the court's assumption) there is no adequate remedy at law; (c) to declare Section 304(f), as so construed, unconstitutional as applied to such circumstances; (d) to enjoin USRA, now, from interfering with any discontinuance or abandonment that some other court may hypothetically find constitutionally required; and (e) to declare other portions of the statute unconstitutional, without explanation, because they do not expressly provide a remedy for the very erosion beyond constitutional limits that the court had already done more than necessary to prevent.

Also at issue in these cases is the extent of the power of Congress, under the Commerce and Bankruptcy Clauses of Article I, Section 8 and consistent with the Fifth Amendment, to require creditors and shareholders of a railroad to suffer interim erosion pending efforts to create a "self-sustaining rail service system." This substantial question was apparently not wholly resolved by this Court's decisions in *Continental Bank* v. *Chicago, Rock Island & P. Ry.*, 294 U.S. 648 (1935); *Reconstruction Finance Corp.* v. *Denver & Rio Grande W.*

R.R., 328 U.S. 495 (1946); and *New Haven Inclusion Cases*, 399 U.S. 392 (1970).

The need for full briefing and oral argument in this matter is manifest. The statute involved is singularly long and complex. The constitutional challenges are many and intricate, and the issues presented here are correspondingly difficult.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction and set the case for briefing and argument.

Respectfully submitted,

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